CF0000061938

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.)

CRIMINAL APPEAL NO. 928 /1999

Appellant - Mohd. Akram Khan
aged about 20 years
S/o Mohd.Hanif alias Akbar
r/o Amarpur, Thana Indvar,
District Shahdol (M.P.)

VERSUS

Respondent - State of Madhya Pradesh

CRIMINAL APPEAL UNDER SECTION 374 OF THE CRIMINAL PROCEDURE CODE,1973

(74)

H.E.R.

9/11

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

(DIVISION BENCH)

CRIMINAL APPEAL NO.928 OF 1999

Mohd. Akram Khan

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE THE CHIEF JUSTICE

Sd/-
Chief Justice

POST FOR JUDGMENT ON 8th- NOVEMBER, 2004

Sd/-
JUDGE
8/11.2004

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

DIVISION BENCH*

CORAM: HON'BLE SHRI A.S.V. MOORTHY, C.J.
& HON'BLE SHRI L.C. BHADOO J.

Criminal Appeal NO. 928 of 1999

Mohd. Akram Khan

Vs.

State of M.P. (Now 'State of Chhattisgarh')

Present:

Shri Abhay Tiwari, counsel for appellant.

Shri Ravindra Agarwal, Panel Lawyer for the State.

JUDGMENT

(Delivered 8th November, 2004)

The following judgment of the Court was delivered by ***Justice L.C. Bhadoo***.

1. The appellant namely Mahmood Akram Khan has preferred this appeal under section 374 (2) of the Criminal Procedure Code being aggrieved by the judgment of conviction and sentence dated 26th February, 1999 passed by the Sessions Judge, Raipur in Sessions Trial No. 15/98 whereby learned Sessions Judge after holding the accused/appellant guilty for commission of the offence under section 302 of the Indian Penal Code sentenced him to undergo imprisonment for life.

2. Co-accused Mahendra Kumar was also tried with the present accused/appellant for commission of the offence under section 201 of the Indian Penal Code. He was held guilty for commission of the offence under section 201 of the I.P.C. and was sentenced

to undergo rigorous imprisonment for 2 years and to pay a fine of Rs. 500/- in default of payment of fine amount to further undergo one month's rigorous imprisonment.

3. Briefly stated prosecution case necessary for the disposal of this appeal is that deceased Abdul Gaffar was working as driver in the Oberoy Transport Company, Raipur. The accused/appellant was also working as driver in the same company. On 10.11.1997, some dispute took place between the accused/appellant and deceased in connection with the transportation of goods. The accused/appellant immediately left the scene and after some time came with a knife and stabbed to Abdul Gaffar on stomach and chest. The offence was witnessed by the helper namely Suresh Udiya and other persons of Oberoy Transport Company. The injured Abdul Gaffar was immediately taken to the Gayatri Hospital and was admitted there where he gave the statement Ex.P/25 to B. K. Uikey, Inspector, Police Station – Sarswati Nagar. Said Shri B. K. Uikey after recording the evidence Ex.P/25 forwarded the same to the Police Station – Amanaka in whose jurisdiction the offence was committed. On receiving the statement the In-charge, Police Station Amanaka registered the case under F.I.R. Ex-P/23 for the offence under section 307 of the I.P.C. Thereafter, the Police Station Amanaka received information from Gayatri Hospital that the injured Abdul Gaffar succumbed to the injuries in the early hours of 11.11.1997 at 2.35 a.m. Therefore, the offence was converted into section 302 of the I.P.C.. Mahendra Kumar Mishra (P.W.18) took up the investigation, he reached to the Gayatri Hospital. After giving notice Ex.-P/13 to the witnesses, he prepared Panchnama of the body of the deceased Ex.P/14. The postmortem was conducted by Dr. Sanjay Kumar Dadu (P.W.7), he after conducting the post mortem prepared report Ex.-P/6. The Investigating Officer during the investigation also took into possession the treatment papers Ex.-P/10 from the hospital. Ex.-P/12 dying declaration was recorded by the treating doctor Dr. Arun Mandharia in the presence of other Doctor (P.W.10) Akhilesh Dubey. The Investigating Officer also took into possession the blood stained clothes of the accused and also the blood stained clothes of the

deceased. In the police custody the accused/appellant gave information Ex.P/16 in which he stated that he gave the knife to Mahendra Manikpuri and thereafter he reached to Mahendra Kumar Manikpuri, who gave memorandum Ex.P/18 and in pursuant to which the knife was recovered from water near the railway station. The blood stained clothes were sent for examination to the Forensic Science Laboratory, Raipur from where the report Ex.P/40 was received, from where the blood stained articles were sent for the examination by the serologist and the serologist report Ex.P/39 was received from Calcutta. After completion of the investigation the charge sheet was filed against the accused/appellant alongwith co-accused.

4. The prosecution in order to prove the offence against the accused/appellant examined in all 20 witnesses and on the other hand the statement of the accused/appellant was recorded under section 313 of the Cr.P.C. in which he denied the prosecution allegation and stated that he has been falsely implicated in the crime.

5. We have heard Shri Abhay Tiwari, learned counsel for the accused/appellant and Shri Ravindra Agarwal, learned Panel lawyer for the State.

6. As far as the question of death of Abdul Gaffar being homicidal is concerned, learned counsel for the accused/appellant has not disputed this fact. Even otherwise, as per the evidence of P.W.7 Dr. Sanjay Kumar Dadu who conducted the postmortem on 11.11.1997 has stated that he saw the stitched wound on the stomach of the deceased and in his opinion the cause of death of Abdul Gaffar was shock as a result of the excessive bleeding and stab injury on the stomach and the death was homicidal in nature. Therefore in view of the above, evidence and also the dying declaration of Abdul Gaffar Ex.P/12 and Ex.P/25 it stands proved that the death of Abdul Gaffar was homicidal in nature.

7. Now, coming to the question of involvement of the accused/appellant in commission of the murder of Abudl Gaffar is concerned, eyewitness Suresh Udiya has not been produced in

the witness box, and other witnesses have turned hostile, therefore, the conviction rests on the dying declaration of the deceased i.e. Ex.P/12 recorded by Dr. Arun Mandharia and Ex.P/25 recorded by B.K.Uikey, as also the circumstantial evidence that the knife was recovered at the instance of the accused/appellant and blood of the blood-group of the deceased and accused was found on the clothes of the deceased and cut of knife were found on the clothes of the deceased corresponding to the injuries on the body of deceased Abdul Gaffar.

8. Learned counsel for the accused/appellant has also not challenged the conviction but he simply argued that the accused assaulted to the deceased in a sudden quarrel and in a heat of passion without intention to commit murder of deceased Abdul Gaffar, therefore, the offence does not travel beyond section 304 Pt.II of the I.P.C., therefore, he has been wrongly convicted under section 302 of the I.P.C..

9. In the dying declaration Ex.P/12 which was recorded by Dr. Arun Mandharia (P.W.15) the deceased Abdul Gaffar has clearly stated that the accused/appellant stabbed him with a knife. Said dying declaration has been proved by Dr. Arun Mandharia and by Dr. Akhilesh Dubey (P.W.10) who assisted in the treatment, has stated that the dying declaration was given in his presence by Abdul Gaffar and was recorded by Dr. Arun Mandharia. Apart from that another dying declaration in the form of merg intimation (Ex. P/25) was recorded by B.K.Uikey Inspector, Police Station Sarsvati Nagar and the same has been proved by B.K. Uikey (P.W.19) in which he has stated that Ex.-P/25 was given by Abdul Gaffar while he was admitted in Gayatri Hospital. Therefore, in view of the above dying declaration, we are of the opinion that learned trial Court has rightly held that the accused/appellant was author of the crime in question.

10. Apart from that, the clothes of the deceased were recovered by the Investigating Officer during the investigation the clothes were stained with blood and the same were sent by the police for serologist examination and serologist in his report Ex.P/39 has mentioned that the shirt, baniyan and full pant were found

stained with human blood of Group – 'A', and as per the blood report of Ex.-P/10 of Gayatri Hospital the blood group of the deceased was 'A". Therefore, based on the serologist report and the blood report of Gayatri Hospital it stands proved that the blood, which was found on the clothes of the accused, was of the deceased. In addition to that, corresponding to the stab injuries on the body of deceased the cuts were found in the shirt and baniyan of the deceased. Therefore, above circumstantial evidence corroborates the dying declaration of the deceased. Therefore, the involvement of the accused in stabbing Abdul Gaffar stands proved by the ample evidence adduced by the prosecution.

11. Now coming to the question that in the facts and circumstances of the case as to which offence was committed by the accused/appellant; in order to appreciate the arguments of learned counsel for the appellant if we look into the dying declaration Ex.P/25 and Ex.P/12 given by the deceased, in both these documents it is stated by Abdul Gaffar that the accused/appellant and the deceased were working as driver in Oberoy Transport Company and on the fateful day i.e. 10.11.1997 at about 5.30 p.m. in the evening some dispute took place between the two regarding transportation of goods, in front of the transport company, accused Mohd. Akram Khan left the scene but after sometime he came with a knife and he stabbed on the chest and stomach. If we look into the above facts there was no previous enmity between the two and the act of the accused was not preplanned and pre-concerted. Some dispute arose between the accused and deceased on a small matter. All of a sudden and in a heat of passion the accused brought knife and assaulted the deceased, therefore, from the above evidence it cannot be inferred that the accused/appellant stabbed the deceased with intention to cause such bodily injury which in all probability was sufficient to commit murder of deceased Abdul Gaffar. The act of the accused squarely fall under exception 4 of Section 300 which says that 'culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of a passion upon a sudden quarrel and without the

offenders having taken undue advantage or acted in a cruel or unusual manner. For this view, we are fortified by the decision of the Hon'ble Apex Court in the matter of **Mahesh Vs. State of M.P.** reported in **1996 (6) Supreme Cases 609**. The facts of that case were that the deceased objected to the appellant not let his cattle damage the crop. The appellant however did not pay any heed to the request of the deceased and insisted that he would graze the cattle in that field and altercation ensued between the deceased and the accused. In that process the appellant dealt a pharsa blow on the head of the deceased Krishna Kumar as a result of which he died on the spot. On these facts Hon'ble Apex Court held that in these circumstances, the accused during a sudden quarrel without any premeditation assaulted the deceased therefore the offence will fall within Exception-4 to Section 300 of the I.P.C. therefore the accused was held guilty under Section 304 Part I of the I.P.C. In another case of **State of Rajasthan Vs. Satyanarayan** reported in **1998 (1) Supreme 433** Hon'ble Apex Court took the similar view. The fact of that case was that accused Satyanarayan was neighbour of Bhima. Some quarrel took place between Bhoridevi, wife of Bhima and the accused and there was exchange of words between her and accused Satyanarayan. In that process the accused assaulted Bhoridevi with an iron pipe. He also injured Ram Gopal and then went back to his house. By that time Kesar Lal (deceased), brother of Bhima, went near the house of accused and started questioning the accused as to why he was quarrelling like that in the morning. Thereupon the accused came out of his house with a knife and inflicted a blow on the abdomen of Kesar Lal as a result of which his intestines came out and he died. The accused ran away from that place. On these facts, the Hon'ble Apex Court held that the respondent had not aimed the blow on any vital part of Ram Gopal or Kesar Lal. The blow was aimed at Ram Gopal but as he moved aside, it landed on the stomach of Kesar Lal. Therefore, the Court held that the appellant should have been convicted under Section 304 Part-I of the I.P.C. and not under Section 302. Similarly in the case of **Shanmugam alias Kulandaivelu Vs. State of Tamil Nadu**, reported in **2003**

Cr.L.J. 418 the Hon'ble Apex Court held that the genesis of the incident as brought out by the prosecution is traceable to a petty quarrel which would have been sparked off by the admonition given by the deceased for his alleged misbehavior in whistling. All of a sudden, he entered his house, picked up the weapon and attacked and inflicted injuries on the deceased. The facts of that case were that on 17.11.1989 the deceased went to the land close to his fields to fetch water from the bore well. When he found his elder brother i.e. the accused whistling at that place, he questioned him as to why he was whistling at a place frequented by ladies. The accused having got enraged at this, ran towards his hut; the deceased followed him and queried as to why he was running. Within a few minutes, he came out of his hut with a sphere, hiding himself alongside the adjoining corn-field and pounced on the deceased and stabbed him on his abdomen and chest. On these facts the Hon'ble Apex Court held that the offence against the accused was made out under section 304-I of the I.P.C.

12. Therefore, in view of the above facts of the present case, we are of the opinion that the offence committed by the accused does not travel beyond section 304-Pt.I of the I.P.C..

13. In the result, the appeal of the accused/appellant is partly allowed. While setting aside the conviction and sentence under section 302 of the I.P.C., instead thereof the appellant is convicted under section 304-I of the I.P.C. and sentenced to undergo rigorous imprisonment of 7 years and to pay a fine of Rs. 1000/-, in default of payment of fine amount to further undergo 5 months rigorous imprisonment. The period for which the accused/appellant remained in the police custody and judicial custody during investigation and trial, is entitled for the set off against the sentence awarded to him.

Sd/-
Chief Justice

Sd/-
L.C. Bhadoo
Judge

Thakur